BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of: Petition of SBC Communications Inc For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services	WC 04-29

OPPOSITION OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO SBC's PETITION FOR FORBEARANCE

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The California Public Utilities Commission (CPUC or California) hereby submits its Opposition to SBC Communications Inc.'s Petition for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services (Forbearance Petition). The petition does not meet the legal standard for forbearance contained in the Communications Act. The FCC has ongoing proceedings addressing many of the issues raised in the petition, and these matters should be resolved in the course of those proceedings.

BACKGROUND

In *AT&T v. City of Portland* (9th Cir. 2000) 216 F.3d 871, 877-878, the U.S. Court of Appeals found that a cable operator offering its subscribers Internet *transmission* over its cable broadband facility provided "telecommunications

service" as defined in the Communications Act. The court recognized that a customer's activities on the Internet could be classified as information services. However it determined that the *facilities* used to connect to the Internet were telecommunications services. (*Id.* at pp. 877-878.) In *Brand X Internet Services v. FCC* (9th Cir. 2003) 345 F.3d 1120, 1130, the court confirmed that *City of Portland's* classification of the transmission facilities used to provide cable modem service as a "telecommunications service" was the controlling interpretation of the Communications Act. The *Brand X* court held that the FCC did not have authority to change the regulatory status of these facilities by classifying them as an information service.

On February 5, 2004, SBC filed two pleadings[1] seeking to end common carrier regulation of facilities or services that use the Internet protocol to provide the transmission of information either to or from an end user customer.[2] SBC's petitions call these facilities and services the "IP platform." SBC proposes to define the IP platform as: "(a) IP networks and their associated capabilities and functionalities . . . , and (b) IP services and applications provided over an IP platform . . . so long as [communication] is sent to or received by an end user in IP. . . ." (Declaratory Ruling Petition at p. 28.) This definition covers not only

[1] SBC also filed a Petition for A Declaratory Ruling in on February 5, 2004 (Declaratory Ruling Petition). That petition was assigned docket number WC 04-36, the same docket in which the FCC issued its NPRM on IP enabled services.

[2] Declaratory Ruling Petition at p. 29. The discussion of the nature of the "IP Platform," including its definition are incorporated by reference into SBC's request for forbearance. (Forbearance Petition at p. 1.)

applications (e.g. viewing web content) that use the Internet protocol but also facilities that use the Internet protocol to transmit information.

The Forbearance Petition invites the FCC to change the regulatory status of services and facilities that use the Internet protocol by using a different technique from the one rejected by the *Brand X* court: forbearance pursuant to Section 10 of the Communications Act, 47 U.S.C. § 160. (Forbearance Petition at p. 4.) In general,[3] Section 10 provides for light-handed regulation of telecommunications carriers and telecommunications services if three conditions are met. If the FCC determines to forbear from regulation, state enforcement of the federal regulation is also precluded.[4]

In order to forbear from regulation the FCC must determine that the regulation is unnecessary to ensure just, reasonable and nondiscriminatory charges, practices and classifications. (47 U.S.C. § 160(a)(1).) The FCC must also conclude that the regulation is not necessary for consumer protection, and that relinquishing its regulatory oversight is consistent with the public interest. (47 U.S.C. § 160(a)(2), (3).) In evaluating the public interest in forbearance, the FCC must consider whether or not forbearance will promote competitive market conditions. (47 U.S.C. § 160 (b).) Section 10 provides that the FCC can forbear from regulation in a

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[3] Subdivision (d) limits the FCC's ability to forbear from regulation pursuant to Section 251, 47 U.S.C. 251, or Section 271, 47 U.S.C. 271.

[4] 47 U.S.C. § 160(e). The legislative history of section 160 makes clear that Congress did not intend to limit or preempt state enforcement of state statutes or regulations. H.R. Conf. Rep. No. 014-458 at 185;

accord, *In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 48 (1998).

narrow and focused way, allowing, for example, forbearance from regulation of a service in one specific geographic market. (47 U.S.C. § 160(a).) SBC asserts that services and facilities using the Internet protocol meet all three requirements for forbearance.

Similar questions are being considered in other FCC proceedings. A NPRM issued on February 26, 2002 sought comment on the appropriate legal and policy framework for wireline broadband services, such as DSL. (CC Docket No. 02-33.) The CPUC has also filed comments on forbearance and other issues in the FCC proceeding reviewing high-speed access to the Internet over Cable facilities (GN Docket No. 00-185). The FCC is also examining the appropriate regulatory framework for VOIP in a NPRM issued on March 10, 2004.

DISCUSSION

SBC correctly characterizes forbearance as the proper regulatory technique to achieve light-handed regulation of carriers or services that no longer require federal oversight. However the range of telecommunications services that SBC seeks to insulate from federal regulation—all facilities and services that allow customers to send or receive information via the Internet protocol—is too broad to permit the application of Section 10 at this time. The range of facilities and services that would be covered by a forbearance order includes bottleneck last mile transmission facilities that do not meet the three-pronged test in Section 10.

I. THE FCC CANNNOT LEGALLY FORBEAR FROM REGULATING THE BROAD RANGE OF FACILITIES AND SERVICES DESCRIBED IN THE PETITION.

The Forbearance Petition relies on the discussion and definition of "IP platform services" contained in the Declaratory Relief Petition. The Declaratory Ruling Petition points out that its definition of the "IP platform" does not differentiate between specific services offered over the IP Platform, nor does it limit itself to any particular type of facility. As long as the facilities involved use the Internet protocol to transmit information to or from an end user, they fall within the definition of the IP Platform "whether the provider uses copper, coaxial cable, fiber, spectrum, or any other medium." (Declaratory Ruling Petition at pp. 25, 30.) As a result, the definition of "IP platform" includes a broad range of facilities and services including high speed internet access services such as cable modem. The definition is so broad that the future composition of the facilities and services that fall within the definition of the "IP Platform" cannot be known.[5]

If the FCC were to grant SBC's Petition, it would risk acting in an arbitrary and capricious manner. Because the extent of the facilities and services that would be covered by a forbearance order is not now known, it would be impossible as a practical matter for the FCC to develop an evidentiary record upon which to base

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[5] The Declaratory Ruling Petition points out that under its definition, "IP platform" facilities and services include "offerings provided by *any* type of communications provider, including telephone companies, cable companies, wireless providers" and companies using more forward-looking technology, such as companies owning electric power lines and satellites. (Declaratory Ruling Petition at p. 30.) The Forbearance Petition points out that if a current part of the switched network were modified so a customer could send or receive communications in "IP format," that transport "would then receive unregulated treatment." (Forbearance Petition at pp. 10, 9.)

such a decision. The FCC would not only have to evaluate the effect of its order on the facilities and services now covered by the Communications Act, but it would need to determine going-forward the effect of a forbearance decision on the facilities and services that could be affected in the future. The short period of time allowed for the FCC to act on a forbearance petition makes this task particularly challenging. After a forbearance petition is filed, the FCC has one year, plus 90 days, to act on it or the petition is deemed granted. (47 U.S.C. § 160(c).)

II. SBC'S PETITION FAILS TO MEET THE TEST SET FORTH IN 47 U.S.C. § 160.

The standard for granting a forbearance petition is set forth in Section 10 of the Communications Act. The FCC must determine, based on a record, that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance for applying such provision or regulation is consistent with the public interest. Section 10(b) goes on to state that the competitive effects of FCC action on a forbearance petition must be weighed. The statute requires the FCC to consider "whether forbearance from enforcing the provisions or regulations will promote competitive market conditions . . . ." (47 U.S.C. § 160(b).) All three

prongs of this test must be met in order for the FCC to forbear from regulation. (*Cellular Tel. & Internet Assoc. v. FCC* 330 F.3d 502 (D.C. Cir. 2003).)

The CPUC has filed comments directly relevant to each of the three prongs of the forbearance test in two already-open FCC proceedings addressing the regulatory status of bottleneck last mile facilities: *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33) and *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities* (GN Docket 00-185).[6] Copies of these pleadings are attached. These comments explain that for most individuals and small businesses a high-speed connection to the internet is a bottleneck last mile facility that must be regulated as a common carrier transmission service. (*E.g.,* California DSL Comments at p. 31.) Although the Forbearance Petition often discusses the competitive aspects of the Internet, or the Internet as a whole, the relief it requests goes directly to last-mile facilities. Because there is limited and uneven competition for the provision of last mile facilities, and the providers of those facilities have—and exercise—the ability to leverage their control over those facilities, forbearance at this time is not proper.

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[6] California filed comments in the Broadband Wireline Facilities docket on May 3, 2003 (California DSL Comments), and in the High-Speed Cable Modem docket on June 17, 2002 (California Cable Modem Comments).

A. Without Regulation, Nothing Can Ensure that Last-Mile Transmission is Provided in a Manner that is Just, Reasonable, or Free from Discrimination.

In order to forbear from applying Title II regulation to facilities and services using the Internet protocol, the FCC must find that regulation is not necessary to ensure just, reasonable and nondiscriminatory service. The Forbearance Petition claims this test is met because:

> …the market for IP platform services is already highly competitive and operates pursuant to cooperative business arrangements. Thus market forces will continue to ensure that rates will be kept at reasonable levels and that providers practices—with respect to consumers and to each other—will remain reasonable and nondiscriminatory.

(Forbearance Petition at page 11.) No further explanation or elaboration is provided.[7] In fact, the CPUC's previous comments demonstrate that competition very often does not exist in the provision of last-mile services. Several areas of California, including mid-sized cities like Fresno, have broadband access to the internet only by way of cable modem. (California Cable Modem Comments at p. 3.) In these areas, ISP service is bundled with cable modem service. The providers of last-mile services do not offer unaffiliated ISPs nondiscriminatory access to their

[7] The Forbearance Petition discusses section 706 of the 1996 Act, although it acknowledges that section 706 does not provide an independent source of forbearance authority. Forbearance Petition at pp. 11-12.

transport facilities, and customers must cannot purchase transport services without the bundled ISP service. (California Cable Modem Comments at p. 4.) Likewise, in many areas of California, DSL service is the only broadband option for residential customers. Furthermore, many small- and medium-sized businesses do not have the option of cable modem service. (California DSL Comments at p. 33.) Even where both cable modem and DSL options exist, a duopoly hardly constitutes a competitive market. These facts demonstrate that "market forces" have not yet ensured that IP platform services are being provided in a way that is just, reasonable and nondiscriminatory. (*See* Forbearance Petition at p. 11.) Because last-mile facilities continue to require common carrier regulation, the first prong of the forbearance test is not met.

Moreover, the unsubstantiated claim that this prong will be met in the future is not sufficient to allow the FCC to forbear from regulation now. The FCC's experience with DSL illustrates how difficult it is to create a competitive market for last-mile services. California's DSL Comments note that DSL providers today have the ability and incentive to engage in discriminatory, anticompetitive conduct that favors their own information services. (California DSL Comments at page 31.) The CPUC's comments recite that between 2000 and 2002 all but one competitive DSL provider left the market, leaving the market to California's dominant DSL provider and a provider partly owned by the dominant provider. (California DSL Comments at p. 32.) Competition declined in this

period despite efforts to foster it. As a result, there is no current record showing that forbearance will produce sufficient competition to make common carrier regulation unnecessary.

B. The Forbearance Petition Fails to Demonstrate that a "Hands-Off" Policy Will Benefit Consumers.

In order to forbear from regulation the FCC must also conclude that the regulation is "not necessary for the protection of consumers." (47 U.S.C. §160a)(2).) The common carrier requirements contained in Title II of the Communications Act cover a variety topics, including access for law enforcement, access to services for deaf and disabled customers, and the protection of customers' private information. (47 U.S.C. §§ 229, 225, 222.) The Forbearance Petition does not explain why Title II regulation is no longer necessary to achieve these goals. Instead, the petition claims that the "hands-off policy that has made the Internet's exponential growth possible" has provided consumers with "tremendous[]" benefits. SBC also argues that that regulation might limit innovation. (Forbearance Petition at p. 10.)

These arguments relate to the competitive portions of the internet, and are not legally sufficient to support deregulating last mile facilities. The unregulated nature of the Internet backbone may have contributed to the "exponential growth" of the Internet as a whole. (*See* Forbearance Petition at p. 10.) The panoply of services available on the Internet may be "tremendous[]." These facts do not, however, provide any record to support the conclusion that the specific consumer

protections contained in Title II of the Communications Act would be afforded in a deregulated environment to customers who must use bottleneck last-mile facilities to connect to the Internet. California has previously explained that customers will have no guarantee that they will be afforded the protections contained in the act if regulation is withdrawn at this time. (California Cable Modem Comments at p. 5.)

In addition, the Forbearance Petition suggests that the FCC might find authority under Title I of the Communications Act if it needed to address specific consumer protection issues. California has previously explained that the proposal to use Title I to regulate services that are unregulated under Title II is flawed. In *California v. FCC* 39 F.3d 919 (9th Cir 1994), the court pointed out that Title I contains no specific grant of jurisdiction to the FCC. Rather, Title I jurisdiction is ancillary to Title II jurisdiction.

C. The Petition Provides no Information Showing that Forbearance Will Promote Competitive Market Conditions, or is in the Public Interest.

The Forbearance Petition's discussion of the third prong of the forbearance test fails to acknowledge the broad effect of order the petition requests. According to SBC, a forbearance order would, "eliminate . . . doubt" that "regulation might . . . be found to apply" to aspects of the Internet that have successfully developed in an unregulated environment. (Forbearance Petition at pp. 2, 6-7.) In addition, however, a forbearance order would deregulate any last-mile facilities that use the

Internet protocol. The claim that forbearance is in the public interest is supported only by the petition's discussion of already-competitive services that use the Internet protocol.[8] As a result, granting the petition's request at best would produce a result that is *only partially* in the public interest. An expansive forbearance order is not in the public interest if that order would cover facilities that are not part of a free market, and where service providers have the opportunity to leverage their bottleneck facilities.

Similarly, the Forbearance Petition's discussion of the potential ill effects of regulation does not justify granting the petition. The Forbearance Petition focuses exclusively on harm that could come from a future decision to regulate portions of the internet that are competitive, or "the internet as a whole." (Forbearance Petition at pp. 6, 8.) This harm is speculative, as the Forbearance Petition acknowledges when it points out that it seeks forbearance of regulations "that might otherwise be found to apply." (Forbearance Petition at p. 2.) On the other hand, California's Cable Modem Comments and DSL Comments demonstrate that, today, last mile facilities are not competitive, and removal of

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[8] For example, the Forbearance Petition asserts that "no single entity or class of entities dominates the provision of IP platform services." (Forbearance Petition at p. 5.) This may be true for a broad class of services that is currently unregulated and about which there is only "doubt" that Title II may apply. (*See* Forbearance Petition at p. 2.) This claim is not correct when it is applied to last-mile facilities. Similarly, there is no "widespread competitive parity" in the provision of IP enabled last-mile facilities that can be "sustained going forward." (*See* Forbearance Petition at p. 5.) The attempt to seek a deregulated status for last mile facilities simply because they use the same technology as other parts of the Internet fails because, as California previously argued, "the critical question is not whether the technical characteristics of a particular network dictate a different regulatory regime" but whether carriers exert bottleneck control over last mile facilities. (California DSL Comments at p. 36.)

their common carrier status would prove harmful to customers. The Communications Act specifically requires the

FCC to weigh the competitive effect of a forbearance order. (47 U.S.C. 160(b).) The FCC cannot conclude that forbearance is in the public interest based on the potential that forbearance might remove a possible future harm when, at the same time, forbearance would deregulate bottleneck facilities where customers have not seen the benefits of competition.

III. THE FCC SHOULD APPLY THE FORBEARANCE TEST ON A CASE BY CASE BASIS, NOT IN AN "EXPANSIVE" MANNER.

As the discussion above points out, the Forbearance Petition requests broad relief that is only partially justified. The FCC already has many of the issues raised in the Forbearance Petition before it. The FCC has received extensive comments on forbearance in its Cable Modem proceeding, and will soon receive comments in response to its NPRM on IP enabled services. As a result, the FCC should dismiss the petition, and consider the questions raised by SBC on a case-by-case basis.

This approach will allow the FCC to properly develop the record it needs to support forbearance, where forbearance is appropriate. It will also allow the FCC to forbear from regulating those specific facilities and services that meet the three-part test in the Communications Act, rather than granting expansive relief that affects some facilities that do not meet the test. Finally, a case-by-case approach will allow the FCC will to consider forbearance in light of the specific circumstances surrounding any new facilities or services that are developed rather than determining the regulatory status of such facilities in advance. The structure

of Section 10 suggests that the forbearance mechanism was meant to deal with discrete issues rather than the large bundle of questions that are implicated by the Forbearance Petition. For example, the fact that Congress contemplated the FCC would apply forbearance to specific carriers and services, or in specific geographic markets (47 U.S.C. § 160(a)), suggests the FCC's forbearance authority cannot be applied to a category of facilities and services that is so broad its exact contours cannot be known.

CONCLUSION

The Petition for Forbearance should be denied because it does not meet the legal standard for forbearance contained in the Communications Act. The FCC has ongoing proceedings addressing many of the issues raised in the petition. These matters should be resolved in the course of those proceedings, rather than on the broad-brush basis SBC requests.

Respectfully submitted,

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